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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 23 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer project services and software consulting company.[1] It seeks to employ the beneficiary permanently in the United States as a software engineer analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a four year baccalaureate degree in computer science. The doctor also determined that the petitioner had not established its ability to pay the proffered wage as of the March 26, 2005 priority date.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As is set forth in the director's January 29, 2009 denial, at issue on appeal is whether the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification. A second issue is whether the petitioner has established its ability to pay the proffered wage. The AAO will first examine the beneficiary's eligibility and qualifications for the proffered position.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

On appeal, counsel states that the director did not examine the materials submitted to the record with regard to the beneficiary's academic credentials, and that the petitioner, by not indicating it required a three or four year bachelor's degree in computer science on the certified ETA Form 9089, would accept

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[1] The petitioner, based on its Form 1120 F tax return, is a foreign corporation, incorporated in India on October 9, 2003. The record also contains a request from counsel dated July 15, 2009 to merge a subsequently approved I-140 immigrant petition (LIN 8254 50005) with the already filed I-485 petition. The request is accompanied by a Form I-797 approval notice for a skilled worker or professional I-140 petition. United States Citizenship and Immigration Services' (USCIS) computer records indicate that the I-140 petition was approved on June 5, 2009; however, the approved I-140 petition is not contained in the record.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

the beneficiary's three-year bachelor's degree in computer science as equivalent to a four-year U.S. baccalaureate degree in computer science.

Eligibility for the Classification Sought

At the outset, it is useful to discuss the DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by Federal Circuit Courts.

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[3] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> * * *
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so

[3]Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

> that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> The [DOL] must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

In summary, it is the DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of U.S. Citizenship and Immigration Services (USCIS) to determine if the petition and

the alien beneficiary are eligible for the classification sought.

Returning to the case at hand, in order to obtain classification in the requested employment-based preference category, the petitioner must establish that the beneficiary is a member of the professions holding an advanced degree or its equivalent. *See* 8 C.F.R. § 204.5(k)(3)

The regulation at 8 C.F.R. § 204.5(k)(2), defines "advanced degree" as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) further requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." The regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language is that the petitioner must establish that the beneficiary possesses a single degree that is a U.S. baccalaureate degree or its foreign equivalent.[4]

Significantly, the third preference professional classification also contains the requirement of a single degree from a college or university. The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C) states:

> If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

The AAO cannot conclude that the evidence required to demonstrate that an alien is a second preference advanced degree professional is any less than the evidence required to show that the alien is a third preference professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Instead, persons who claim to qualify for an immigrant visa by virtue of a combination of education (and/or experience) equating to a U.S. bachelor's degree may qualify as a third preference skilled worker pursuant to Section 203(b)(3)(A)(i) of the Act.

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[4]It is noted that the H-1B nonimmigrant visa category regulation permits "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience. 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). The regulations pertaining to the immigrant classification sought in this case do not contain similar language.

Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991).[5] Further, in the final rule for 8 C.F.R. § 204.5, the legacy Immigration and Naturalization Service (the Service), responded to criticism that the regulation did not allow for the substitution of experience for education. In response, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, an alien must have at least a bachelor's degree. 56 Fed. Reg. 60897,60900 (Nov. 29,1991).

In summary, there is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full U.S. baccalaureate degree (or foreign equivalent) from a college or university. *See* 8 C.F.R. § 204.5(k)(3)(i)(B).

The record of proceeding contains the beneficiary's diploma and seven Statements of Marks for a three-year bachelor of science degree from Bharathiar University, Coimbatore, India. The beneficiary's Memorandum of Marks reflects that he studied in the field of computer science from 1993 to 1996. None of the Memorandum documents indicate any credit hours for any written or class sessions, but rather contains the maximum marks for the course, the passing minimum, what marks the beneficiary received, and whether the beneficiary passed or failed the respective course. The petitioner also submitted the beneficiary's Consolidated Statement of Marks that lists the courses that the beneficiary passed during his six semesters of study. The record also contains a Statement of Marks for a Post Graduate Diploma in Computer Applications that the beneficiary attended from July 2006 to June 1997 at the Logic Version Computer Corporation Education Division.[6]

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[5] *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability")(emphasis added).

[6] This diploma is not from a university or college and thus is not considered part of the beneficiary's university level studies in computer science. Neither evaluator examined this document

In response to the director's Request for Evidence (RFE) dated June 11, 2007, the petitioner submitted two evaluations of the beneficiary's bachelor of science degree, and a letter from Professor [redacted] dated August 25, 2007. The AAO will address Professor [redacted]'s correspondence first and then discuss the two additional evaluation reports submitted to the record.

Professor [redacted], identified as a professor of physics, University of Mumbai for five years and the former director of Engineering at All India Radio, states that he examined the beneficiary's educational record. Professor [redacted] then states that in the United States, a bachelor's degree requires at least 1800 contact hours which translates as 120 semester credit hours, and that to his knowledge there is no three year Indian bachelor's degree that requires fewer than 1800 contact hours for graduation, with the majority of such programs requiring well over 2000 contacts hours.

Professor [redacted] then states an Indian 3 year bachelors' degree contains at a minimum 1800 contact hours, which translates into 120 semester credit hours in the United States system based on the universally accepted computation of 15 contact hours being equal to one U.S. semester credit. Professor [redacted] then states that with the Indian bachelor's degree, the allocation of marks to courses on the marks sheets with respect to the total marks for the degree represents a proportional allocation of credit within the degree, and that it is correct to carry through this proportional allocation when the conversion is made to the U.S. semester credit hour system. Professor [redacted] concludes that the beneficiary's education record represents a single source degree that is the equivalent of the bachelor's degree in the U.S. system. The AAO notes that there is no evidence in the record demonstrating that Professor [redacted] is qualified to determine whether a foreign academic credential is equivalent to a U.S. baccalaureate.

One of the evaluations submitted to the record, dated August 24, 2007, was prepared by [redacted] for European-American University, Ltd.,[7] located in the Commonwealth of Dominica (Linley evaluation).[8] The second evaluation, dated August 23, 2007, was prepared by [redacted] for Marquess Educational Consultants Limited, located in England ([redacted] evaluation).[9]

The [redacted] and [redacted] evaluations both conclude that the beneficiary's three-year bachelor of science degree from Bharathiar University is equivalent to a U.S. bachelor of science degree in computer science, representing 120 semester credit hours. Both evaluators utilize Professor

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in their evaluations. The AAO will not examine the document any further in these proceedings.

[7]According to its website, www.thedegree.org/apel.html (accessed September 18, 2009), European-American University, Ltd. awards degrees based on experience.

[8]The evaluation states that [redacted] has a canonical diploma of Sacræ Theologiæ Professor, equivalent to a Doctorate of Divinity, from St. David's Oecumenical Institute of Divinity. The only mention of this institution on the internet is a reference to its founding in 1985. www.liberalcatholics.org/education.html. This website also has a section dedicated to European-American University, Ltd.

[9]The evaluation states that [redacted] has a Doctor of Divinity, but does not indicate the school where he obtained this degree.

[redacted]'s assertions that the beneficiary's studies represent 120 semester credit hours, from a U.S. institution of post secondary education.

It is noted that the contents of the two evaluations are fundamentally identical, with each evaluation referencing many of the same supporting materials with regard to accelerated university programs, the Bologna three-year degree, and other issues.

The fundamental argument of both evaluations is that the beneficiary's three-year bachelor's degree from India is equivalent to a U.S. bachelor's degree, because it requires the same or more than the number of classroom hours (or "contact hours") as a U.S. bachelor's degree. Since the beneficiary's three-year bachelor's degree from India allegedly requires over 1800 contact hours, representing 120 semester credit hours, the evaluations conclude that it is equivalent to a four-year U.S. bachelor's degree.

The two evaluations and Professor [redacted]'s letter base this equivalency formula on the claim that the U.S. semester credit hour is a variant of the "Carnegie Unit." The Carnegie Unit was adopted by the Carnegie Foundation for the Advancement of Teaching in the early 1900s as a measure of the amount of classroom time that a high school student studied a subject.[10] For example, 120 hours of classroom time was determined to be equal to one "unit" of high school credit, and 14 "units" were deemed to constitute the minimum amount of classroom time equivalent to four years of high school.[11] This unit system was adopted at a time when high schools lacked uniformity in the courses they taught and the number of hours students spent in class.[12] According to the foundation's website, the "Carnegie Unit" relates to the number of classroom hours a high school student should have with a teacher, and "does not apply to higher education."[13]

In its analysis of the beneficiary's credentials, the [redacted] evaluation breaks down the subjects listed on the beneficiary's transcript into courses and practicals, and awards credits for each course and practical, concluding that the beneficiary achieved over 120 "contact hours using the Carnegie Unit," with a GPA of 2.54. The evaluation does not explain how the individual course credit numbers were determined, which are all designated as four. The beneficiary's transcript does not provide any information as to classroom hours or credits. The [redacted] evaluation makes no attempt to assign credits for the beneficiary's individual courses, and merely concludes that the beneficiary's three-year bachelor of science degree is equivalent to a U.S. degree, representing 120 semester credit hours.

There is no support in the record for the argument that a three-year bachelor's degree from India is equivalent to a U.S. bachelor's degree because both degrees allegedly require an equivalent amount

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[10]The Carnegie Foundation for the Advancement of Teaching was founded in 1905 as an independent policy and research center whose charge is "to do and perform all things necessary to encourage, uphold, and dignify the profession of the teacher." http://www.carnegiefoundation.org/about/index.asp.

[11]http://www.carnegiefoundation.org/about/sub.asp?key=17&subkey=1874.

[12]*Id.*

[13]*Id.*

of classroom time, or one allegedly requires an even greater amount of classroom time. The evaluations fail to provide any peer-reviewed material (or other reliable evidence) confirming that assigning credits based on hours spent in the classroom is applicable to evaluating three-year bachelor of science degrees from India. For example, if the ratio of hours spent studying outside the classroom is different in the Indian and U.S. systems, comparing hours spent in the classroom would be misleading.[14]

Both evaluations also argue that the U.S. and India are members of United Nations Educational, Scientific and Cultural Organization (UNESCO) treaties, and that UNESCO "clearly recommends that the 3 and 4 year degree should be treated as equivalent to a bachelor's degree by all UNESCO members." In support of this claim, the evaluations reference the UNESCO Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993. UNESCO has six regional conventions on the recognition of qualifications, and one interregional convention. A UNESCO convention on the recognition of qualifications is a legal agreement between countries agreeing to recognize academic qualifications issued by other countries that have ratified the same agreement. While India has ratified one UNESCO convention on the recognition of qualifications (Asia and the Pacific), the United States has ratified none of the UNESCO conventions on the recognition of qualifications. In an effort to move toward a single universal convention, the UNESCO General Conference adopted a Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993. The United States was not a member of UNESCO between 1984 and 2002, and the Recommendation on the Recognition of Studies and Qualifications in Higher Education is not a binding legal agreement to recognize academic qualifications between UNESCO members.[15] Specifically, the UNESCO Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993 contains the language relating to "recognition" of qualifications awarded in higher education. Paragraph 1(e) defines recognition as follows:

> "Recognition" of a foreign qualification in higher education means its acceptance by the competent authorities of the State concerned (whether they be governmental or nongovernmental) as entitling its holder to be considered under the same conditions as those holding a comparable qualification awarded in that State an deemed comparable, for the purposes of access to or further pursuit of higher education studies, participation in research, the practice of a profession, if this does not require the passing of examinations or further special preparation, or all the foregoing, according to the scope of the recognition.

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[14] *See e.g.*, [redacted] The University of Texas at Austin, "Assigning Undergraduate Transfer Credit: It's Only an Arithmetical Exercise," at http://handouts.aacrao.org/am07/finished/F0345p_M_Donahue.pdf (accessed September 18, 2009)(stating that the Indian system is exam-based instead of credit-based, thus transfer credits from India are derived from the number of exams passed; and that, in India, six exams equates to 30 credit hours).

[15] *See* http://www.unesco.org.

The UNESCO recommendation relates to admission to graduate school and training programs and eligibility to practice in a profession. Nowhere does it suggest that a three-year degree must be deemed equivalent to a four-year degree. More significantly, the recommendation does not define "comparable qualification." At the heart of this matter is whether the beneficiary's degree is, in fact, the foreign equivalent of a U.S. baccalaureate. The UNESCO recommendation does not address this issue.

In fact, UNESCO's publication, "The Handbook on Diplomas, Degrees and Other Certificates in Higher Education in Asia and the Pacific" 82 (2d ed. 2004), provides:[16]

> Most of the universities and the institutions recognized by the UGC or by other authorized public agencies in India, are members of the Association of Commonwealth Universities. Besides, India is party to a few UNESCO conventions and there also exist a few bilateral agreements, protocols and conventions between India and a few countries on the recognition of degrees and diplomas awarded by the Indian universities. But many foreign universities adopt their own approach in finding out the equivalence of Indian degrees and diplomas and their recognition, just as Indian universities do in the case of foreign degrees and diplomas. The Association of Indian Universities plays an important role in this. *There are no agreements that necessarily bind India and other governments/universities to recognize, en masse, all the degrees/diplomas of all the universities either on a mutual basis or on a multilateral basis.* Of late, many foreign universities and institutions are entering into the higher education arena in the country. Methods of recognition of such institutions and the courses offered by them are under serious consideration of the government of India. The [University Grants Commission], [All India Council for Technical Education] and [Association of Indian Universities] are developing criteria and mechanisms regarding the same.

Id. at 84. (Emphasis added.). In summary, reliance on UNESCO for the proposition that a three-year Indian bachelor's degree is equivalent to a four-year U.S. bachelor's degree is misplaced.

Both evaluations assert that some U.S. institutions of higher education will consider holders of three-year bachelor's degrees from India for entry into their master's degree programs. However, the evaluations do not address whether those few U.S. institutions that accept three-year degrees from India do so subject to additional conditions, such as requiring the degree holder to complete extra credits prior to admission. Further, the fact that some U.S. graduate programs accept three-year degrees has little relevance to whether the beneficiary's degree is, in fact, the foreign equivalent of a U.S. baccalaureate.

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[16] http://unesdoc.unesco.org/images/0013/001388/138853E.pdf.

Both evaluations also state that some U.S. institutions offer three-year bachelor's degree programs. It is noted that there exists accelerated degree programs in the United States. However, this fact provides no useful information about the degree obtained by the beneficiary in India. At issue is the actual equivalence of the specific degree the beneficiary obtained, not whether it is possible to obtain a baccalaureate in less than four years in an accelerated program in the United States. The beneficiary did not compress his studies to obtain a degree in less than four years from an institution that grants four-year degrees, and, even if this were the case, the petitioner would need to establish that the beneficiary's accelerated degree is equivalent to a four-year, 120 credit hour U.S. bachelor's degree.

Both evaluations also cite a Council of Graduate Schools survey concerning the acceptance of three-year degrees. The survey shows that a small number of U.S. graduate programs accept three-year degrees from India. The survey does not reflect how many of the limited number of institutions that accept three-year degrees from outside of Europe do so provisionally. If the three-year Indian baccalaureate were truly a foreign equivalent degree to a U.S. baccalaureate, the vast majority of U.S. institutions would accept these degrees for graduate admission without provision. The cited survey underlines that there is not wide acceptance within the academic community of three-year degrees for admission into graduate schools. The evaluations provide no study or report that conclusively states that all Indian three-year degrees are equivalent to a U.S. bachelor's degree, or even that Indian three-year degrees are generally accepted for admission into U.S. graduate degree programs.

The Linley evaluation cites an article from World Education News & Reviews (WENR), titled "Evaluating the Bologna Degree in the U.S."[17] WENR is a monthly newsletter published by World Education Services (WES), a credentials evaluation organization. The newsletter article includes a brief assessment of three-year Bologna degrees from Europe. The article states that U.S. bachelor's degrees are based on the completion of 120 semester credits, and are generally completed over a four-year period. According to the article, approximately half of a U.S. bachelor's degree is devoted to general studies, and the remaining credits are devoted to the student's major and related subjects. In contrast, the Bologna degrees "are more heavily concentrated in the major – or specialization – and that the general education component which is so crucial to U.S. undergraduate education is absent." The article compared a bachelor's degree in business administration from Indiana University in Bloomington, and a business administration Bologna degree from the Bocconi University in Milan, Italy. The article concludes, after assessing the requirements for admission to a Bologna degree program, its contents and structure, and the function that the credential is designed to serve in the home system, that the Bologna degree is "functionally equivalent to a U.S. bachelor's degree." However, this non-peer reviewed article from a newsletter is irrelevant as it provides no evidence for why the beneficiary's bachelor's degree from India is equivalent to a U.S. bachelor's degree.

[17] www.wes.org/eWENR/04march/Feature.htm.

The [redacted] evaluation cites to an article titled "Does the Value of Your Degree Depend on the Color of Your Skin?" which the author co-wrote with [redacted] The record contains no evidence that this article was published in a peer-reviewed publication or anywhere other than on the internet. The article states that some British and U.S. colleges and universities accept three-year bachelor's degrees for admission to graduate school, but acknowledges that others do not. The article concedes:

> None of the members of [the National Association of Credential Evaluation Services] who were approached were willing to grant equivalency to a bachelor's degree from a regionally accredited institution in the United States, although we heard anecdotally that one, [World Education Services], had been interested in doing so.
>
> In this process, we encountered a number of the objections to equivalency that have already been discussed.
>
> [redacted], Ed.D., President of Educational Credential Evaluators, Inc. [(ECE)], commented thus,
>
> Contrary to your statement, a degree from a three-year "Bologna Process" bachelor's degree program in Europe will NOT be accepted as a degree by the majority of universities in the Untied States. Similarly, the majority do not accept a bachelor's degree from a three-year program in India or any other country except England. England is a unique situation because of the specialized nature of Form VI.
>
> * * *
>
> International Education Consultants of Delaware, Inc., raise similar objections to those raised by ECE,
>
> The Indian educational system, along with that of Canada and some other countries, generally adopted the UK-pattern 3-year degree. But the UK retained the important preliminary A level examinations. These examinations are used for advanced standing credit in the UK; we follow their lead, and use those examinations to constitute [an] additional year of undergraduate study. The combination of these two entities is equivalent to a 4-year U.S. Bachelor's degree.
>
> The Indian educational system dropped that advanced standing year. You enter a 3-year Indian degree program directly from Year 12 of your education. In the US, there are no degree programs entered from a stage lower than Year 12, and there are no 3-year degree programs. Without the additional advanced standing year, there's no equivalency.

In addition, the [redacted] evaluation cites to the article "Three Year Undergraduate Degrees: Recommendations for Graduate Admission Consideration", ADSEC News, April 2005. The [redacted]

evaluation claims that the article concludes that, because the U.S. is willing to consider three-year degrees from Israel and the European Union, Indian bachelor's degree holders should be provided the same opportunity to pursue graduate education in the U.S. However, the article does not suggest that Indian three-year degrees are comparable to a U.S. baccalaureate. Instead, the article proposes accepting a *first class honors* three-year degree[18] following a secondary degree from a Central Board of Secondary Education or Council for the Indian School Certificate Examinations program, or a three-year degree *plus a post graduate diploma* from an institution that is accredited or recognized by the National Assessment and Accreditation Council and/or the All India Council for Technical Education. Therefore this non-peer reviewed article from a newsletter directly undermines the argument that three-year degrees from India are, as a whole, equivalent to four-year U.S. bachelor's degrees.

The AAO also reviewed AACRAO's Project for International Education Research (PIER) publications: the *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* (1997). We note that the 1997 publication incorporates the first degree and education degree placements set forth in the 1986 publication. *Id.* at 43. As with EDGE, these publications represent conclusions vetted by a team of experts rather than the opinion of an individual. One of the PIER publications also reveals that a year-for-year analysis is an accurate way to evaluate Indian post-secondary education. *A P.I.E.R. Workshop Report on South Asia* at I80 explicitly states that "transfer credits should be considered on a year-by-year basis starting with post-Grade 12 year." The chart that follows states that 12 years of primary and secondary education followed by a three-year baccalaureate "may be considered for undergraduate admission with possible advanced standing up to three years (0-90 semester credits) to be determined through a course to course analysis." This information also undermines the evaluations submitted, both of which attempt to assign credits hours for the beneficiary's three-year baccalaureate that are close to or beyond the 120 credits typically required for a U.S. baccalaureate.

USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). The AAO would give no weight to either the [redacted] evaluation or the [redacted] evaluation.

In the [redacted] evaluation, the evaluator states that USCIS cites to *Matter of Sea* when an initial credential evaluation has failed to substantiate the case at issue, and a subsequent evaluation is inadmissible, even if correct, because it is not in agreement with the previous evaluation. The AAO finds this statement to be inaccurate as well as inapplicable in the instant matter. In the instant matter, the petitioner submitted no educational evaluation with the initial I-140 petition. The director provided the petitioner with the opportunity to submit an educational evaluation to the record. The

[18] The AAO notes that the beneficiary's diploma reflects that he graduated Third Class in all three parts of his baccalaureate program.

director, while not addressing the contents of the two evaluations submitted or Professor [redacted]'s letter, correctly found that the two evaluations were insufficient to establish that the beneficiary had the minimum educational requirements for the proffered position.

In light of the above, it is concluded that the academic credentials evaluations submitted by the petitioner do not establish that the beneficiary possesses a foreign degree that is equivalent to a U.S. bachelor's degree. Accordingly, the beneficiary cannot be classified as a member of the professions, and the petition must be denied.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements.

See Madany, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, line 4, of the labor certification reflects that a bachelor's degree in computer science is the minimum level of education required. Line 6 requires 60 months of work experience prior to the 2005 priority date. Line 8 reflects that a master's degree with no experience is an acceptable alternate to the bachelor's degree with five years of work experience. Line 9 reflects that a foreign educational equivalent is acceptable.

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification.

The Petitioner's Ability to Pay the Proffered Wage

The AAO will now examine the second issue raised by the director in his decision. With regard to the petitioner's ability to pay the proffered wage, the regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on March 26, 2005. The proffered wage as stated on the ETA Form 9089 is $87,000 per year. On the ETA Form 9089, Part J, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of August 31, 2004. On the petition, the petitioner claimed to have an establishment date in 1996, a gross annual income of $12,000,000, and to currently employ 110 employees.

The petitioner did not submit any evidence as to its ability to pay the proffered wage with the initial petition.

On June 11, 2007, the director requested evidence pertinent to the petitioner's ability to pay the proffered wage. The director specifically requested that the petitioner provide copies of the beneficiary's W-2 Forms to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the director requested copies of the petitioner's federal income tax returns for tax years 2005 and 2006 and/or independently audited financial statements for 2005 and 2006. The director also requested the beneficiary's W-2 Forms for 2005 and 2006; copies of the petitioner's Form 941, Employer's Quarterly Federal Tax Form; and any relevant state unemployment compensation reports form for the four quarters of 2005, 2006, and the first quarter of 2007.

In response, the petitioner submitted an undated letter written by [redacted], the petitioner's president and CFO, states that he was advised that pursuant to 8 C.F.R. 204.5 (g)(2), a statement from a financial officer is acceptable as evidence of the petitioner's ability to pay the proffered wage if the petitioner employs over l00 individuals, and asked that his letter be accepted as that statement. Mr. [redacted] also states that the petitioner was formerly known as Sigma Project Services, Inc., founded in 1996, and that the petitioner is a leading information technology company with broad range of knowledge and expertise. Mr. [redacted] states that the petitioner currently has 102 employees and gross annual revenue of $8 million dollars.

The petitioner submitted ADP generated quarterly reports for the first, second, third quarter of 2005 and 2006 that lists the petitioner's number of employees in various states during the respective quarters and their salaries. These reports include a front page entitled "Federal Information" that indicates the petitioner's Quarterly 941 Forms has been filed with the Social Security Administration and that the petitioner's W-2 forms have been submitted. The state reports cumulatively indicate that the petitioner paid wages to 107 employees in 2005. Finally the petitioner submitted copies of the beneficiary's W-2 Forms for tax years 2005 and 2006. These documents indicate the petitioner paid the beneficiary $34,721.92 in 2005, and $53,692 in tax year 2006.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the 2006 priority date, and denied the petition.

On appeal, counsel asserts that the submission of the petitioner's CFO letter is sufficient to establish the petitioner's ability to pay the proffered wage. Although counsel does not address these documents in his brief, on appeal, the petitioner appears to have submitted its Forms 1120-F, U.S.

Income Tax Return of a Foreign Corporation, for tax years 2005 and 2006. The petitioner's tax year runs from April 1, to March 31 of the respective years. The petitioner also submitted unaudited balance sheets and profit and loss account reports as of March 31, 2006 and March 31, 2005. These documents were prepared by accountants in Chennai, India.

The tax returns for a foreign corporation raise questions as to the petitioner's identity. The regulation at 8 C.F.R. 204.5 (c) states : Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203 (b)(1)(B), 203(b)(i)(C), 203(b)(2), or 203(b)(1)(3). In the instant matter, the petitioner is filing the petition under section 203(b)(2). However, the corporate database of California indicates that Sigma Project Services, Inc. the business allegedly taken over by the petitioner and located at the same [redacted] address in Cerritos, California as the petitioner was registered on August 2, 1996, and has a present status of "dissolved." There is no indication that this company merged with the petitioner.

It further notes that the petitioner, Ntrust Infotech Private Limited is in active status and notes that the company's jurisdiction is India. (The California database reports are enclosed with this decision.) The database provides an address in Santa Ana, California for the petitioner, rather than the Cerritos address identified on the I-140 petition or the tax returns submitted on appeal. Thus, while the California database indicates that the petitioner, as a foreign company, is registered to conduct business in California, the record is not clear with regard to the petitioner's current address and location, or that it can file I-140 petition as a U.S. employer. Without further clarifying information on the business operations of the petitioner, the AAO determines that the petition should be dismissed. For illustrative purposes only, the AAO will examine the petitioner's financial reports submitted on appeal or previously submitted materials.

The petitioner's 1120-F tax returns reflect the following information for the following years:

	2005	2006
Net income	$11,594[19]	$18,628
Current Assets	$1,535,311	$1,765,316
Current Liabilities	$1,525,018	$1,150,009
Net current assets	$10,293	$615,307

The AAO notes that the unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

[19] This figure is found on Section II, line 30 of the Form 1120-F.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), USCIS will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in either 2005, the year in which the priority date of March 26, 2005 was established, or in tax year 2006. Thus, the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages[20] and the proffered wage of $87,000.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[21] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-

[20] As stated previously, the petitioner paid the beneficiary $34,721.92 in 2005, and $53,692 in tax year 2006.

[21] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets"

end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner has not demonstrated that it paid he full proffered wage in tax year 2005 that includes the March 2006 priority date. In 2005, the petitioner shows a net income of only $11,594, and net current assets of only $10,293, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2005.

The petitioner has not demonstrated that it paid full proffered wage in 2006. In tax year 2006, the petitioner shows a net income of only $18,628. However, it had net current assets of $615,307, and thus can establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage of $87,000 or $33,308.

Further, USCIS records indicate that the petitioner has filed 189 petitions from 2004 to the present time. In 2005, the priority date year, the petitioner filed 34 petitions that included some 16 I-140 petitions.[22] In 2006, the petitioner filed 63 petitions, including 32 I-140 petitions. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. In the instant matter, the petitioner would have to establish its ability to pay the proffered wages of all the I-140 petitions filed in 2005. If all the I-140 beneficiaries whose petitions were submitted in 2005 were offered wages similar to the beneficiary's proffered wage, the petitioner would need net income or net current assets of $1,392,000[23] to establish its ability to pay all the proffered wages.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2005 or that it had the ability to pay the difference between the beneficiary's wages and the proffered wage and the wages offered to other beneficiaries

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consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[22] This figure represents all petitions filed in the calendar years of 2005 and 2006. If calculated by the petitioner's fiscal year of April 1 to March 31 of each year, these figures could change, but the petitioner would still have to establish its ability to pay the wages for beneficiaries with pending or approved I-140 or I-129 petitions.

[23] This figure is calculated by multiplying sixteen petitions by $87,000.

of pending or approved I-140 or I-129 petitions in 2005 or 2006. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.